Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

PAULA KILCOYNE,

Petitioner,

v.

BENTLEY COLLEGE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI.

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October 22, 1997

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51 pp

QUESTIONS PRESENTED.

A. Whether the First Circuit decides an important federal question in a way that conflicts with a relevant decision of the Supreme Court when it affirms there is no sex discrimination violative of Title VII although the trial court found ethnicity to be a significant hiring factor.

B. Whether the decision of the First Circuit conflicts with decisions of the Third Circuit that proof of discriminatory motive is not a burden of a prima facie case of Title VII discrimination.

C. Whether an order of double costs chargeable against appellant's counsel without notice or an opportunity to be heard is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

LIST OF PARTIES.

Petitioner

PAULA KILCOYNE

Respondents

1. BENTLEY COLLEGE,
2. EARL L. AVERY,
3. PHILIP FRIEDMAN,
4. H. LEE SCHLORFF, AND
5. STEWART P. SHAPIRO.

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ON PETITION FOR A WRIT OF CERTIORARI TO
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PETITION FOR A WRIT OF CERTIORARI.

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the First Circuit Court of Appeals entered in the above-entitled proceeding on May 22, 1997, and the order denying petitioner's petition for rehearing entered on July 24, 1997.

REPORTS OF OPINIONS.

The judgment of the First Circuit Court of Appeals for which review is sought is reported as *Kilcoyne* v. *Bentley College*, 114 F.3d 1169 (lst Cir. 1997). The opinion of the United States District Court for the District of Massachusetts is unreported.

JURISDICTION.

The plaintiff filed this suit in the federal district court for the District of Massachusetts on October 6, 1993, pursuant to 28 U.S.C. §§ 1331, 1343 (alleging civil rights violations pursuant to 42 U.S.C. §§ 1981 and 2000(e) *et seq.*), 1367, 1391(b), and 1391(c). On August 5, 1996, the district court entered summary judgment for the respondents with respect to counts I, II, and III, and dismissed pendent counts IV and V without prejudice.

The petitioner appealed as of right from the district court to the First Circuit Court of Appeals. The Court of Appeals had jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1291, 1292, 1294(l), and 2071-2072 (Rules of Appellate Procedure), specifically, Federal Rules of Appellate Procedure, Rule 3. The First Circuit entered judgment for the respondents on May 22, 1997. On petition for rehearing, the First Circuit entered a denial of the petition on July 24, 1997. No extension of time to file this petition has been sought.

Jurisdiction of this Court to review the judgment of the First Circuit is invoked under 28 U.S.C. § 1254(l).

STATUTES INVOLVED IN THE CASE.

1. **42 U.S.C. § 2000e-2(a):**

It shall be an unlawful employment practice of an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individuals race, color, religion, sex, or national origin.

2. **42 U.S.C. § 2000e-2(m):**

Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

3. **28 U.S.C. § 1927:**

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

4. **Federal Rules of Appellate Procedure, Rule 38:**

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

5. **Federal Rules of Appellate Procedure, Rule 39(a):**

Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

STATEMENT OF THE CASE.

Bentley College is a privately owned institution of higher learning with a campus at Waltham, Massachusetts. Dr. Paula Kilcoyne was employed there for three years, full-time but not on tenure track, as an assistant professor in the Government Department, during which time she demonstrated that she was completely qualified for the position. In November 1991, the Government Department published advertisements seeking applicants for the job Dr. Kilcoyne held, but as a potential tenure-track position. Dr. Kilcoyne applied. From applications, Bentley College selected two finalists, Dr. Kilcoyne and another woman, Maria Guido.

At the time of the hiring decision, Dr. Kilcoyne possessed the advertised requirements for the position, while Ms. Guido did not. Dr. Kilcoyne had an earned doctoral degree, an advertised absolute requirement for the position, while Ms. Guido did not. Ms. Guido's record was objectively inferior to that of Dr. Kilcoyne in the areas of teaching and research. Bentley College employed different processes to evaluate Dr. Kilcoyne and Ms. Guido. Dr. Kilcoyne was told by Stewart P. Shapiro, department chairman at the time, that Ms. Guido was purportedly evaluated more highly than Dr. Kilcoyne because she had favorable evaluations from the people she met during her interviews and because Vice President Philip Friedman was impressed with her, but Dr. Kilcoyne was not introduced to these people and Vice President Friedman refused to meet her.

At a department meeting to discuss the tenure-track position, Chairman Shapiro told department members, falsely, that Ms. Guido had published scholarly articles and gave additional false and misleading information about Ms. Guido's credentials before asking their opinion as to whom to hire. The mendacity of Chairman Shapiro influenced some members of the department to favor Ms. Guido. Ms. Guido was selected for the position.

After Dr. Kilcoyne learned that Ms. Guido had been selected, she spoke to Bentley College's Affirmative Action Officer, Earl L. Avery, specifically requesting that the meeting be kept confidential. He advised her to file a grievance. Dr. Kilcoyne told Mr. Avery that she did not want to file a grievance until after she had obtained letters of reference for fear of retaliation. Mr. Avery, in violation of Dr. Kilcoyne's confidence, told two members of the Government Department that Dr. Kilcoyne would be filing a grievance. He did this without consulting Dr. Kilcoyne and before she obtained any references.

Dr. Kilcoyne then filed a grievance with Mr. Avery's office. After having discussed her situation with an attorney, she attempted to contact Mr. Avery again. He did not respond to her letters and telephone calls. When her contract expired on June 30, 1992, Dr. Kilcoyne left Bentley College.

In September 1992 she returned to Waltham to appear before a grievance panel at Bentley College. Bentley College procedures provided that Mr. Avery would initially select panel members, subject to the grievant's (Dr. Kilcoyne's) approval. Mr. Avery selected two administrators and one faculty member to serve on the panel and told Dr. Kilcoyne that she could not alter the panel's composition. The grievance panel was to consider questions of process only, i.e., whether the process accorded Dr. Kilcoyne in considering applicants was the process due according to law and according to Bentley College's own policy and procedure. Instead, the panel deliberated comparative credentials of the two candidates and did not consider process. The panel then rejected the grievance. on October 7, 1993, Dr. Kilcoyne filed the instant lawsuit. Counts I and III raised claims of disparate treatment and disparate impact discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., and Count V raised a pendent state common law claim of breach of contract against all of the defendants. After litigation commenced, the defendants cited Maria Guido's Costa Rican ethnic origin as a factor which substantially influenced their decision to hire her and to reject Dr. Kilcoyne.

On August 5, 1996, the District Court entered summary judgment on Counts I, II, and III and dismissed pendent Counts IV and V. Dr. Kilcoyne appealed with respect to Counts I, III, and V to the First Circuit Court of Appeals (Docket No. 96-2089), which affirmed the District Court's decision, entering a judgment and issuing an opinion, per curiam, on May 22, 1997. The First Circuit gave double costs to ap-

pellees, chargeable to appellant's counsel, with no notice or opportunity to be heard.

REASONS FOR GRANTING THE WRIT.

I. THE FIRST CIRCUIT'S AFFIRMANCE OF SUMMARY JUDGMENT AGAINST A PLAINTIFF CLAIMING SEX DISCRIMINATION IN VIOLATION OF TITLE VII, WHEN PLAINTIFF ESTABLISHES THAT THE HISPANIC ETHNICITY OF THE LESS QUALIFIED, SELECTED APPLICANT WAS A SIGNIFICANT HIRING FACTOR, CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

In the instant case, Dr. Kilcoyne applied for a position which was advertised as requiring a doctorate, evidence of ongoing scholarly effort, the ability to teach American National Government, and expertise in Comparative / International Politics. Unlike Maria Guido, Dr. Kilcoyne possessed an earned doctorate, had a track record of scholarly effort, and had successfully taught American National Government at Bentley College for three years. Dr. Kilcoyne's expertise in Comparative / International Politics, a preferred but not a required attribute, was greater than Ms. Guido's.

In the district court, respondents offered evidence and argued that they placed substantial reliance on a factor, national origin, whose consideration is forbidden by Title VII, in choosing Maria Guido over Dr. Kilcoyne. The district court observed:

> The defendants state that the committee . . . believed Guido's Hispanic ethnicity would complement the student body. . . .

See p. 7a-8a, *infra*. Not only did the district court have before it evidence that the respondents selected Maria Guido over Dr. Kilcoyne because of the difference in ethnicity between the two candidates, but it then went on to find expressly that:

> Guido's Hispanic ethnicity appeared to play a significant role in the hiring decision. . . .

See p. 14a, *infra*. In fact, the district court judge pointed out from the bench:

> Frankly, what struck me, and maybe I should not say, was Bentley College was opening it up to a discrimination case, based on discriminating against [non] Hispanics, Affirmative Action against [non] Hispanics, but sex was not the one that sort of popped up.

Transcript of summary judgment hearing.

These findings eliminated the necessity for any Court to apply the prima facie case. Not only have the respondents failed to rebut direct evidence of reliance upon a prohibited factor, ethnicity, as a substantial factor in choosing Maria Guido over Dr. Kilcoyne, but they offered this as an excuse not to be held responsible for sex discrimination.

Justice O'Connor has described two cases analogous to the case at bar:

> First, *McDonnell Douglas* [*Corp.* v. *Green*, 411 U.S. 792 (1973)] dealt with a situation where the plaintiff presented no direct evidence that the employer had relied on a forbidden factor

under Title VII in making an employment decision. The prima facie case established there was not difficult to prove, and was based only on a statistical probability that when a number of potential causes for an employment decision are eliminated an inference arises that an illegitimate factor was in fact the motivation behind the decision. In the face of this inferential proof, the employer's burden was deemed to be only one of production; the employer must articulate a legitimate reason for the adverse employment action. The plaintiff must then be given an "opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a cover-up for a racially discriminatory decision." *McDonnell Douglas*, 411 U.S. at 805, 903 S.Ct. at 1826. our decision in Texas *Department of Community Affairs* v. *Burdine* also involved the "narrow question" whether, after a plaintiff had carried the "not onerous" burden of establishing the prima facie case under *McDonnell Douglas*, the burden of persuasion should be shifted to the employer to prove that a legitimate reason for the adverse employment action existed. As the discussion of *Teamsters* [v. *United States*, 431 U.S. 324 (1977)] and *Arlington Heights* [v. *Metro. Hous. Corp.*, 429 U.S. 252 (1977)] indicates, I do not think that the employer is entitled to the same presumption of good faith where there is direct evidence that it has placed substantial reliance on factors whose consideration is forbidden by Title VII.

. . .

> As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by. That the employer's burden in rebutting such an inferential case of discrimination is only one of production does not mean that the scales should be weighted in the same manner where there *is* direct evidence of intentional discrimination. Indeed, in an Age Discrimination in Employment case, the Court seemed to indicate that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 112 (1985).

Price Waterhouse v. *Hopkins*, 490 U.S. 228, 270, 271 (1989) (O'Connor, J., concurring).

Decisions to hire professors based on ethnicity or the ethnic mix of the student body are clearly wrong. This Court addressed the question with respect to public schools in 1985:

> Decisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under the Fourteenth Amendment. This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality,'" *Loving v. Virginia*, 388 U.S. 1, 11 (1967), quoting *Hirabayashi* v.

> *United States*, 320 U.S. 81, 100 (1943). "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *University of California Regents* v. *Bakke*, 438 U.S. 265, 291 (1978)(opinion of Powell, J., joined by White, J.)

Wygant v. *Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) .

Title VII at 42 U.S.C. § 2000e-2(a) establishes that it is an unlawful practice for an employer to make an employment decision based on national origin. Respondents did not argue the existence of a bona fide program of affirmative action nor that they had validated some relationship between Hispanic ethnicity and the ability to teach subjects with Latin American content. In the absence of such validation, the respondents engaged in nothing more than prohibited ethnic stereotyping.

The First Circuit had previously recognized:

> The Supreme Court has instructed that the shifting burdens of proof set forth in *McDonnell Douglas* are "inapplicable where the plaintiff presents direct proof of discrimination."

Fields v. *Clark Univ.*, 817 F.2d 931, 935 (1st Cir. 1987) (cites to seven federal appellate and Supreme Court cases omitted). The First Circuit abrogated this rule in deciding the case at bar.

Just last year this Court wrote:

> In our view, however, the proper solution to the problem lies not in making an utterly irrelevant factor an element of the prima facie case, but

> rather in recognizing that the prima facie case requires "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . ." *Teamsters* v. *United States*, 431 U.S. 324, 358 . . . (1977) (emphasis added).

O'Connor v. *Consolidated Coin Caterers Corp.*, ___ U.S. ___, ___, 116 S.Ct. 1307, 1308 (1996).

It is well settled that:

> [W]hen the defendant . . . responds . . . by offering evidence of the reason for the plaintiff's rejection, the fact finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage the *McDonnell-Burdine* presumption "drops from the case," [*Burdine, supra*] at 255, n.10, and "the factual inquiry proceeds to a new level of specificity." *Id.* at 255.
>
> Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant.

United States Postal Serv. v. *Aikens*, 460 U.S. 711, 715 (1983); *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985) (shifting burdens of prima facie case are inapplicable where plaintiff presents direct evidence of discrimination); *Fields* v. *Clark Univ.*, 817 F.2d 931, 937 (1st Cir. 1987).

Title VII recites in pertinent part:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e-2(m). The trial court clearly recognized ethnicity as a significant factor in the hiring decision. It should have entered judgment for Dr. Kilcoyne as to liability.

II. THE FIRST CIRCUIT, BY AFFIRMING SUMMARY JUDGMENT ENTERED ON THE GROUND THAT THE PETITIONER FAILED TO PRESENT ADMISSIBLE EVIDENCE SUFFICIENT TO MAKE A PRIMA FACIE CASE OF SEX DISCRIMINATION, ERRED IN REQUIRING EVIDENCE AT THE PRIMA FACIE STAGE THAT SEX WAS NOT TREATED NEUTRALLY IN THE HIRING DECISION, A REQUIREMENT WHICH IS IN DIRECT CONFLICT WITH DECISIONS OF THE THIRD CIRCUIT.

The First Circuit Court of Appeals affirmed in its per curiam decision the "Memorandum and order on Defendants' Motion for Summary Judgment" issued by the District Court for the District of Massachusetts. In it, the district court articulated Dr. Kilcoyne's burden in establishing a prima facie case of employment discrimination:

> Kilcoyne may make out a prima facie case of discrimination by demonstrating that (1) she is

> a member of a protected class; (2) she applied for and was qualified for a position for which Bentley was seeking applicants; (3) despite her qualifications, she was rejected; and (4) Bentley did not treat sex neutrally in the hiring decision.

See p. 10a-11a, *infra*. The district states the fourth element incorrectly. As this Court has ruled:

> The plaintiff must prove by a preponderance of the evidence that she . . . was rejected under circumstances which give rise to an inference of discrimination.

Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. 248, 253 (1981).

The district court then found:

> Kilcoyne has failed to produce any admissible evidence that gender played any role at all in Bentley's hiring decision.

See p. 12a, *infra*., and subsequently held:

> that Kilcoyne has failed to present admissible evidence to meet even her non-onerous burden of a prima facie case of gender discrimination.

See p. 16a-17a, *infra*. The finding and holding were affirmed by the First Circuit. But the holding is in error, for there is no requirement that a plaintiff produce evidence of discriminatory animus in her prima facie case.

The Massachusetts district court should know better. In *Worlds* v. *Thermal Industries, Inc.*, 928 F. Supp. 115 (D.Mass. 1996), it recognized:

> The United States Supreme Court recently held that a plaintiff in an age discrimination case need not show that he was replaced by a person outside of his protected class in order to establish a *prima facie* case of discrimination. *See O'Connor* v. *Consolidated Coin Caterers Corporation*, ___ U.S. ___, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). Although the *O'Connor* analysis was extended by the Seventh Circuit Court of Appeals to the race discrimination context, *see Carson* v. *Bethlehem Steel Corp.*, 82 F.3d 157 (7th Cir. 1996), the First Circuit Court of Appeals has yet to apply *O'Connor* in any context.

Worlds, *supra* at 120 n.1. The First Circuit's decision in the instant case implicitly rejects the *O'Connor* analysis, but ruling per curiam precludes a reported opinion — an opinion which would be in direct conflict with the Third Circuit Court of Appeals.

The Third Circuit has ruled that no Supreme Court pronouncement requires an employment discrimination plaintiff to prove discriminatory motive as an element of her prima facie case. *Marzano* v. *Computer Science Corp., Inc.*, 91 F.3d

497, 506-508 (3rd Cir. 1996). The Third Circuit rejected the following holding of a district court:

> [T]o establish a prima facie case in the context of a work-force reduction, a plaintiff must do more than merely show that unprotected employees were retained in their positions; the plaintiff must produce some additional evidence that he was singled out for discharge because of his protected status.

Id. at 507 quoting the District Court typescript. Without mincing words, the *Marzano* court ruled:

> We reject the "additional evidence" requirement . . . because it subverts the entire analytical framework constructed by the U.S. Supreme Court, this Court, and other circuits for the consideration of summary judgment motions in employment discrimination cases.

Id. at 507.

What makes an employer's personnel action unlawful discrimination is the intent behind the action. *U.S. Postal Serv. Bd. of Governors* v. *Aikens*, 460 U.S. 711, 715 (1983) ("The 'factual inquiry' is [whether] the defendant intentionally discriminated against the plaintiff.'") For obvious reasons, it is extremely difficult — if not impossible to establish directly the motivation of one's employer, or that of any third party. *See Id.* at 716 ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult . . . . There will seldom be eyewitness testimony

as to the employer's mental processes.") The legal scheme against discrimination would be little more than a toothless tiger if the courts were to require such direct evidence of discrimination at the prima facie stage.

In 1987 the Third Circuit ruled:

> [W]e do not require direct proof of . . . discrimination because it is often unavailable or difficult to find "Even an employer who knowingly discriminates on the basis of [protected status] may leave no written records revealing the forbidden motive and may communicate it orally to no one." *LaMontagne* v. *American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir. 1984).

Chipollini v. *Spencer Gifts, Inc.*, 814 F.2d 893, 899 (3rd Cir.) *cert. dismissed*, 483 U.S. 1052 (1987).

As a result, most employment discrimination lawsuits seek to prove intent through inference. Because plaintiffs seldom can present evidence affirmatively pointing to their employer's actual reason for taking certain action against them, they must instead try to show through the burden-shifting process that no reason other than discrimination is plausible and that, accordingly, discrimination must have been the reason. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

The burden-shifting analysis of *McDonnell Douglas* as developed and refined subsequently is designed to insure that the plaintiff has enough evidence to construct the chain of inferences necessary to get to trial. The modest evidentiary burden at the prima facie stage is only to demonstrate to the court that the plaintiff's factual scenario is compatible with discriminatory intent, i.e., that discrimination could be a reason for the

employer's action. This burden is not intended to be onerous. *Burdine, supra* at 253.

By meeting her prima facie burden, the plaintiff earns the right to require the employer to offer an explanation other than discrimination why the employee suffered an adverse employment action. If the employer proffers a discriminatory reason, as herein, the plaintiff is entitled to judgment as a matter of law. *Marzano, supra* at 508.

Just last year the Third Circuit decided *Taxman* v. *Board of Educ. of Township of Piscataway*, 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, ___ U.S. ___, 117 S.Ct. 2506 (1997). The *Taxman* court ruled that affirmative action cannot be a basis for making an employment decision where "there is no congressional recognition of diversity as a Title VII objective requiring accommodation." *Id.* at 1558. Here, as in *Taxman*, the employer favored the minority over the nonminority employee because the favored candidate's minority status "would complement the student body." *Infra*, p. 8a. As the *Taxman* court makes clear:

> [A]ffirmative action must be supported by "a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary."

Taxman, supra at 1560, quoting *Wygant, supra*, 476 U.S. at 277.

The respondents have never disputed that Dr. Kilcoyne is a woman, qualified to do the job, and rejected. She both possessed the doctorate and had the record of scholarly activity which were published requirements of the position. Maria Guido did not yet have her doctorate and had no record of scholarly activity at the time of the hiring decision. Discrimi-

nation against a woman who met the advertised criteria and would force a tenure decision within short time by hiring a woman who did not minimally meet the advertised criteria and would not confront the defendants with a tenure decision for five or six years is sex discrimination in and of itself. *Welch* v. *Univ. of Texas & Its Marine Science Inst.*, 659 F.2d 531, 533 n.3 (5th Cir. 1981).

Long ago, the First Circuit Court of Appeals appeared to realize that proof of replacement by one outside plaintiff's protected class is not a component of the prima facie case:

> The [district] court was also incorrect in instructing that, as part of his prima facie case, Loeb had to prove that "he was replaced by a younger person or person outside the protected age group." **The prima facie case described in *McDonnell Douglas* did not include proof that some person outside the protected class was hired in complainant's place. . . .** It is because of this logic that the prima facie case in *McDonnell Douglas* included, in addition to proof that the plaintiff belonged to a racial minority and was rejected for a job for which he applied, proof that there actually was a job opening and that plaintiff was qualified for it.

Loeb v. *Textron, Inc.*, 600 F.2d 1003, 1012-1013 (1st Cir. 1979) (emphasis added). The prima facie case requires no proof of motive or intent — this only is required after the burden shifts to the defendant and then shifts back again. In the case at bar, Dr. Kilcoyne met the modest burden of the prima facie case.

III. AN ORDER BY THE FIRST CIRCUIT COURT OF APPEALS OF DOUBLE COSTS CHARGEABLE AGAINST APPELLANT'S COUNSEL, WITHOUT NOTICE OR AN OPPORTUNITY TO BE HEARD, IS SUCH A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The Judgment entered on May 22, 1997, recites, "Double costs are granted to appellees, chargeable against appellant's counsel," and in its Per Curiam opinion, the First Circuit Court of Appeals wrote:

> Double costs are granted to appellees, chargeable against appellant's counsel. *See* Fed. R. App. P. 38; 28 U.S.C. § 1927. . . .

But Rule 38 permits assessment of costs only "after a separately filed motion or notice from the court and reasonable opportunity to respond. . . ."

The Advisory Committee Notes for the Rules of Appellate Procedure explain:

> The [1994] amendment [to Rule 38] requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions

> constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

Id. In the instant case, no motion was filed by the appellees and no separate notice was given by the Court of Appeals that damages or costs were contemplated. The only motion filed by the appellees requested the court to strike the appellant's brief, and the First Circuit denied that motion, treating it merely as an objection to the statement of facts. Because the Dr. Kilcoyne was not on notice that sanctions pursuant to Rule 38 or 28 U.S.C. § 1927 were contemplated, neither appellant nor her counsel sought to be heard on the issue.

Chief Deputy Clerk of the First Circuit Court of Appeals wrote to counsel on May 22, 1997, that:

> Under paragraph (a) of F.R.A.P. 39, double costs are granted to appellees, chargeable against appellant's counsel, who, under paragraph (c) of this Rule may recover the costs of reproducing their brief, and their share, if any, of the costs of reproduction of the appendix to the briefs. . . .

Id. However, Rule 39(a) neither provides for multiple costs nor for taxing these against counsel, reciting only that "[I]f an appeal is dismissed, costs shall be taxed against the appellant. . . ."

Because Rule 39 does not provide for assessing multiple costs or for assessing costs against the attorney, as opposed to his client, it cannot be a basis for the assessment ordered. Moreover, the First Circuit did not dismiss the appeal, but considered the merits and decided to affirm the decision below. Assessment of a penalty against counsel for Dr. Kilcoyne under either Rule 38 or Rule 39 is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

CONCLUSION.

For the reasons articulated above, this petition for certiorari should be granted.

Respectfully submitted,

J. DANIEL LINDLEY
Counsel for Petitioner
33 Mount Vernon Street
Beacon Hill
Boston, Massachusetts 02108
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October 22, 1997

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APPENDIX A.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 96-2089

PAULA KILCOYNE,
Plaintiff, Appellant,
v.

BENTLEY COLLEGE, ET AL.,
Defendants, Appellees.

BEFORE
Torruella, Chief Judge,
Bownes and Cyr, Senior Circuit Judges.
ORDER OF THE COURT
Entered: July 24, 1997

Upon consideration of appellant's petition for rehearing, It is ordered that the petition for rehearing be denied.

By the court:
WILLIAM H. NG, Clerk
By Janice M. O'Neil
Chief Deputy Clerk

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-2089

PAULA KILCOYNE,
Plaintiff - Appellant,
v.
BENTLEY COLLEGE, ET AL.,
Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Patti B. Saris, U.S. Dist. Judge]
Before
Torruella, Chief Judge,
Bownes and Cyr, Senior Circuit Judges.

J. Daniel Lindley for appellant.
David C. Henderson, with whom Sharon R. Burger and Nutter, McClennen & Fish, LLP were on brief for appellees.

May 22, 1997

Per Curiam. Upon full consideration of the record, briefs and argument of counsel, we affirm the decision of the district court on the basis of its Memorandum and Order, dated August 2, 1996, on Defendant's Motion for Summary Judgment.

Affirmed. Double costs are granted to appellees, chargeable against appellant's counsel. See Fed.R.App.P. 38; 28 U.S.C. § 1927 ("Any attorney . . . who so multiplies the pro-

ceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.").

APPENDIX C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
CIVIL ACTION NO. 93-12183-PBS

PAULA KILCOYNE,
Plaintiff,

v.

BENTLEY COLLEGE, EARL L. AVERY, PHILIP FRIEDMAN, H. LEE SCHLORFF, and STEWART P. SHAPIRO, the last four both individually and as agents of BENTLEY COLLEGE,
Defendants.

MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

August 2, 1996

SARIS, U.S.D.J.

INTRODUCTION

Plaintiff Paula Kilcoyne claims that Bentley College engaged in sex discrimination when it hired another, less-qualified, woman for a tenure track position. She alleges both disparate treatment and disparate impact, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (Counts I & III)[1] Kilcoyne also brings state wrongful termination and breach of contract claims (Counts IV and V).

---

[1] Plaintiff does not press her claim of violation of 42 U.S.C. § 1981 (Count II).

Although Kilcoyne was rejected in favor of a woman, she alleges that Bentley intentionally hires unqualified women who are outside candidates in order to ensure that qualified female internal candidates who are approaching their tenure date do not achieve tenure, and to thwart challenges of sex discrimination. Although such a scheme would constitute sex discrimination in violation of Title VII, Kilcoyne has failed to provide any admissible evidence that Guido was unqualified for the position or that Bentley has a general practice of hiring less-qualified women to diminish the number of viable female tenure track candidates.

After hearing, the defendants' motion for summary judgment is **ALLOWED** as to Counts I, II, and III. The state claims (Counts IV and V) shall be dismissed without prejudice.

FACTUAL BACKGROUND

Except where otherwise noted, the following facts are treated as undisputed for purposes of this motion only. All factual inferences are drawn in the plaintiff's favor, and all factual disputes are resolved in her favor. Although neither Kilcoyne's nor Guido's resume or personnel record has been submitted to this Court, the Court assumes that Kilcoyne agrees with the qualifications as reported by her expert.

Bentley is a privately-owned college in Waltham, Massachusetts. In November 1991, Stewart P. Shapiro, the chair of Bentley's Government Department, published an advertisement seeking applicants for a potential tenure-track position which read in relevant part:

> Potential tenure-track position at the Assistant Professor level. Ph.D. and teaching experience

> required with a strong commitment to undergraduate teaching. Evidence of ongoing scholarly effort and/or publications record needed. Position combines teaching required basic course in American National Government each semester. Expertise in Comparative / International Politics. Concentration in Latin America preferred.

Pl.'s Opp'n Ex. 4.

The search committee consisted of the three tenured professors in the Government Department -- Shapiro, William Kimball, and Christine Williams. From over fifty responses to the position announcement, the committee selected two women as finalists -- Paula Kilcoyne and Maria de los Angeles Guido. Most of the applicants were men, and many of them rated significantly higher than both Kilcoyne and Guido in terms of objective qualifications such as years with Ph.D., teaching experience, and publications. (Pl.'s Opp'n Ex. 3, Statistical Report of David A. Burn [Burn Report].)

Kilcoyne, a white female, was employed as a part-time instructor in Bentley's Government Department from 1986 until 1989. From 1989 until 1992, she worked as a non-tenure-track assistant professor on successive one-year contracts, acting as a temporary replacement to a faculty member on leave. (MCAD Complaint Form 5, Ex. to Compl.). At the time of the contested hiring decision, Kilcoyne had six-and-one-half years with a Ph.D. and had taught at Bentley for five-and-one-half years, including courses in American National Government. She had received excellent student evaluations. During her employ Kilcoyne presented several scholarly papers at professional conferences. She submitted three scholarly articles for publication, two of which the publishers re-

quested be revised and resubmitted. There is no evidence that they were published at the time of the hiring decision. (Compl. ¶ 20.)[2]

Guido, an Hispanic female, was a doctoral student at Texas A&M University in 1991, when she wrote to Bentley to inquire about a position. (Pl.'s Opp'n Ex. 5 [Guido Aff.].) In response to her letter, Shapiro phoned her to advise her of an opening in a non-tenure-track position. After Guido reported that she would only be interested in a tenure-track position, Shapiro phoned back with the news that the position was now tenure-track. Shapiro told Guido that there were only two other candidates for the position, and agreed to pay Guido's moving expenses if she accepted Bentley's offer.

Guido had not yet received her doctorate at the time of the job search. She did not receive her doctorate until soon after she began teaching at Bentley in the fall of 1992. She had two-and-one-half years teaching experience, including experience teaching American National Government. (Burn Report.) Guido's expertise was in Latin American politics and international political economy, and she had traveled extensively internationally. Guido had presented conference papers. She had several works in progress, but no published articles to her name.

Guido was flown up to Boston for her interview. She was invited to dinner by the three full professors in the Department and met with various faculty members and administrators, including Dean H. Lee Schlorff and Vice President Philip Friedman. Guido gave a presentation related to her areas of expertise. During this process, Department Chair Shapiro told the Department professors that Guido had published scholarly

---

[2] Kilcoyne's expert's tables indicate that Kilcoyne had six journal articles. However, the expert included in the tally works-in-progress as well as published works. Burn Report at 6.

articles, although she had not done so. Guido was introduced to the Department as the "new person." (Guido Aff.) After these on-campus interviews, Shapiro told Guido that she had the position.

In contrast, Kilcoyne met privately with Dean Schlorff for approximately forty-five minutes. He started the meeting by telling her he had no questions and asked her what they were going to talk about. During a previously scheduled Department meeting -- a meeting which no one outside the Department was invited to attend -- Kilcoyne gave a presentation about the psychological background of American presidents.

The search committee voted unanimously to offer the position to Guido. The defendants state that the committee (1) was impressed with Guido's expertise in and presentation on Latin American politics and international political economy; (2) believed that Guido's Hispanic ethnicity would complement the student body; and (3) believed that Kilcoyne would have required a tenure track decision in one or two years, and due to her lack of publications would be unlikely to be prepared by that time. Guido would not have come up for tenure for at least five years.

Kilcoyne filed a grievance with the college, alleging "disparate treatment" during the job application, but making no reference to gender discrimination. She left Bentley when her contract expired on June 30, 1992, returning only to appear before a grievance panel in September, 1992. The panel rejected Kilcoyne's grievance. Kilcoyne filed a complaint with the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission in August 1992. A Notice of Right to Sue was issued July 9, 1993, and this action followed in October 1993.

In March 1995, the Government Department recommended that Guido's employment be terminated. (Guido Aff.) Guido was criticized for low student enrollment and for failing to

meet a three article per year publication requirement. She states, however, that the low enrollment resulted from the Department's decision to assign her to an elective course in a specialized area, and that she first heard of the publication requirement during her final review.

DISCUSSION

A. Summary Judgment

"Summary judgment is appropriate when 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Barbour v. Dynamics Research Corp., 63 F.3d 32, 36 (1st Cir. 1995) (quoting Fed.R.Civ.P. 56(c)). "To succeed [in a motion for summary judgment], the moving party must show that there is an absence of evidence to support the nonmoving party's position." Rogers v. Fair, 902 F.2d 140, 143 (1st Cir. 1990); see also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

"Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party, who 'may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial.'" Barbour, 63 F.3d at 37 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)). "There must be 'sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted,'" Rogers, 902 F.2d at 143 (quoting Anderson, 477 U.S. at 249-50) (citations and footnote in Anderson omitted). The Court must "view the facts in the

light most favorable to the nonmoving party, drawing all reasonable inferences in that party's favor." Barbour, 63 F.3d at 36.

B. Title VII claims

Title VII forbids an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

As the First Circuit has explained, Title VII "forbids both 'overt discrimination' in the form of disparate treatment, and more subtle forms of discrimination, known as disparate impact discrimination, arising from 'the *consequences of* employment practices, not simply the motivation.'" E.E.O.C. v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 600 (1st Cir.), cert. denied, 116 S.Ct. 65 (1995). Kilcoyne alleges discrimination under both theories.

1. Disparate treatment

The Supreme Court has clearly articulated how a plaintiff without direct proof of discriminatory animus may prove discriminatory treatment. "First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). Kilcoyne may make out a prima facie case of discrimination by demonstrating that (1) she is a member of a protected class; (2) she applied for and was qualified for a position for which Bentley is seeking applicants; (3) despite her qualifications, she was rejected; and (4) Bentley did not treat sex neutrally in the hiring decision. See Meredith v. Beech Aircraft Co., 18 F.3d 890, 895 (10th Cir. 1994) (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093 (1981); Holt v. Gamewell Co., 797 F.2d 36, 37-38 (1st Cir. 1986).

"Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate nondiscriminatory reason for the employee's rejection." Burdine, 450 U.S. at 252-53. Third, once the employer has articulated a legitimate, nondiscriminatory reason for the discharge, the plaintiff, to avoid judgment against her, "must introduce sufficient evidence to support two additional findings: (1) that the employer's articulated reason for the job action is a pretext, and (2) that the true reason is discriminatory." Smith v. Stratus Computer, Inc., 40 F.3d 11, 16 (1st Cir. 1994), cert. denied, 115 S.Ct. 1958 (1995). That is, a plaintiff must "adduce sufficient evidence to support a finding that [the employer's] stated reason was not only a pretext, but that it was a pretext for illegal . . . discrimination." Id.; see also St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2751 (1993)

("[N]othing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that the employer's explanation of its action was not believable."). In all cases, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." Burdine, 450 U.S. at 253.

The plaintiff need not show that the improper factor was the only reason for an adverse employment action. Pursuant to 42 U.S.C. § 2000e-2(m), enacted as part of the 1991 Civil Rights Act, Title VII plaintiff may prevail by showing mixed-motive, that is, by demonstrating that race, color, religion, sex, or national origin was "a motivating factor for any practice, even though other factors also motivated the practice." However, if the employer proves it "would have taken the same action in the absence of the impermissible motivating factor," the employee's remedies are limited to declaratory relief, certain injunctive relief, and attorney's fees and costs. 42 U.S.C. § 2000e-5(g)(2)(B).

Kilcoyne has failed to produce any admissible evidence that gender played any role at all in Bentley's hiring decision. A woman typically satisfies the final element of her prima facie case by proving that she was rejected in favor of a male. See, e.g., Pallotta v. Marriott Corp., 61 Fair Empl. Prac. Cas. (BNA) 923, 924 (D.Mass. 1993) ("In light of the fact that Marriott hired another woman to fill the position, it is doubtful that plaintiff has indeed established a prima facie case."); Meredith v. Beech Aircraft Corp., 18 F.3d 890, 897 (10th Cir. 1994) (rejecting disparate treatment claim because person who received promotion was part of the protected group). Although rejection in favor of a man is not the only way to make out a prima facie case, plaintiff also has no other evidence like discriminatory comments which would create a reasonable infer-

ence of gender discrimination. See e.g., Welch v. University of Texas, 659 F.2d 531, 533 & n.3 (5th Cir. Unit A Oct. 1981) (where supervisor stated he did not want a woman with a doctorate in his employ, and subsequently hired a woman without a doctorate, the fact that the replacement was a woman did not negate the claim of sex discrimination).

Instead, Kilcoyne argues that Bentley intentionally discriminated against women by way of an elaborate scheme designed to avoid Title VII liability. Specifically, she suggests that Bentley purposely hired women who were unlikely to achieve tenure in order to limit the number of tenured women in the college. By rejecting well-qualified women in favor of other women, the school would thwart Title VII claims by the women who were rejected. Down the road, when the less-qualified woman was terminated or denied tenure, there would be evidence that she was poorly qualified for the job, negating a Title VII claim related to the failure to retain or promote.

Courts have recognized the possibility of such a scheme. The First Circuit has stated that "[r]eplacement [of an age discrimination plaintiff] by someone older would suggest no age discrimination but would not disprove it conclusively," noting that "[t]he older replacement could have been hired, for example, to ward off a threatened discrimination suit." Loeb v. Textron Inc., 600 F.2d 1003, 1013 n.9 (1st Cir. 1979). One court actually faced such a case. In Jones v. Western Geophysical Co. of America, 669 F.2d 280, 284 (5th Cir. 1982), the defendant, moved for summary judgment on the grounds that the plaintiff, a fired black employee, had been replaced with another black man. The plaintiff produced evidence suggesting that the "replacement" actually performed different work on a different shift. Moreover, the replacement had always been "an unreliable and tardy employee" and had resigned or been fired from the company for incompetence no fewer than six times previously. The court held that, although

the replacement was a member of the protected class, he was so clearly unqualified for the job as to give rise to the implication that the replacement was pretextual.

However, this case does not fall within the Jones paradigm. It is true that Guido was later terminated for failing to meet certain publication requirements (which she claims she didn't know about) and poor student enrollment in her class. Also, at the time of hiring, she had not yet obtained her Ph.D. and had fewer years in teaching than Kilcoyne. However, Guido had taught the relevant courses for two-and-one-half years, was well-respected by her department, and had traveled internationally. Most importantly, she had the expertise in Latin America which the school had highlighted in its advertisement by stating: "Concentration in Latin America Preferred." Although she did not have her Ph.D. at the time of the job search, she had completed the requirements and officially received the degree soon after she arrived at Bentley. Kilcoyne has not submitted any evidence to dispute Guido's expertise in international or Latin American politics or to question her prior experience in teaching American National Government. Indeed, Kilcoyne's own expert lists both Guido's and Kilcoyne's experience in teaching American National Government as "High." (Pl.s Opp'n Ex. 3, Fig. 3). He also points out that several men had greater experience and a better publication record than both of them. While consideration of Guido's Hispanic ethnicity appeared to play a significant role in the hiring decision, this was not evidence of sex discrimination.

Nor has Kilcoyne submitted any circumstantial evidence that Bentley has discriminated on the basis of sex in other hiring decisions. She has not provided statistical evidence that women are underrepresented at Bentley, nor pointed to any other hiring decision that fits the alleged pattern. See Schuler v. Polaroid, 848 F.2d 276, 278-79 (1st Cir. 1988) (rejecting age discrimination claim where employee neither was replaced

by someone younger nor could point to anything "about the size of the pool of potentially affected employees, the age or kind of employee likely in the pool, the nature of the work force . . . , or the way in which these employees were treated that would permit a fact finder to find actionable age discrimination"). The two-men/one-woman breakdown of senior faculty in the Government Department is too small to support any meaningful conclusion. Although Kilcoyne complains that the college has not kept adequate personnel records, she could have supplied some of this evidence from her own observations over six year at the college.

Kilcoyne complains that Bentley's consideration of when she would be up for tenure was discriminatory. Although it is conceivable that consideration of when a female candidate will be up for tenure might serve as a smokescreen for gender discrimination, to survive summary judgment, Kilcoyne must go much further than posit a theory. She must provide evidence from which a fact-finder could conclude that the stated reason was a pretext in this particular case, and that it was a pretext for gender discrimination.

Dr. William Kimball, a tenured professor of government at Bentley College who voted in favor of Guido over Kilcoyne, submitted an affidavit on Kilcoyne's behalf, stating that the hiring process had been "botched" because his decision was based on erroneous information about Kilcoyne's time-to-tenure and Guido's publication record. Kimball believed that Kilcoyne had only one year to the tenure decision and could not possibly get tenure in so short a time. That Bentley may have made a mistake in hiring Guido based on erroneous assumptions or information does not mean that there was sex discrimination. Cf. Villanueva v. Wellesley College, 930 F.2d 124, 130 (1st Cir. 1991) ("[I]t is not our task to determine which of the candidates would have been Wellesley's best choice for tenure."), cert. denied, 502 U.S. 861 (1991); Var-

gas-Figueroa v. Saldana, 826 F.2d 160, 162-63 (1st Cir. 1987) ("Courts have wisely recognized the importance of allowing universities to run their own affairs (and to make their own mistakes).").

Kilcoyne provides some evidence, such as affidavits from Kimball and Guido, to suggest that the committee's stated reasons for choosing Guido were pretexts intended to ensure that the required departmental process carried out an administrator's unstated personal commitment to hire Guido. It appears that Shapiro may have modified the job description to meet Guido's desire for a tenure-track position. He also may have puffed up her credentials in discussions with department faculty and other administrators. Guido may have received more careful consideration than Kilcoyne. However, even if the hiring decision were a foregone conclusion and the hiring process a sham designed only to lead to that conclusion, there is no gender discrimination unless the unfairness was motivated by gender. Cf. Foster v. Dalton, 71 F.3d 52, 56 (1st Cir. 1995) ("An employer can hire one person instead of another for any reason, fair or unfair, without transgressing Title VII, as long as the hiring decision is not spurred by race, gender, or some other protected characteristic. . . . Title VII does not outlaw cronyism.").

The Court holds therefor that Kilcoyne has failed to present admissible evidence to meet even her non-onerous burden of a prima facie case of gender discrimination. For the same reasons, she has failed to meet her ultimate burden of advancing sufficient evidence to prove that the college's stated reasons for the decision were mere pretexts for illegal sex discrimination.

2. Disparate impact

Kilcoyne also alleges discrimination under a "disparate impact" theory. In the 1991 Civil Rights Act, Congress codified the requirements of the disparate impact claim. See 42 U.S.C. § 2000e-2(k). Under the portion of the statute relevant to Kilcoyne's claim, she must "demonstrate[] that [Bentley] uses a particular employment practice that causes a disparate impact on the basis of" sex.[3] 42 U.S.C. § 2000e 2(k)(1)(A)(i); see also Holt v. Gamewell Corp., 797 F.2d 36, 37 (1st Cir. 1986) (requiring plaintiff to show "that a facially neutral practice has a significant discriminatory impact on members of the protected class").

To make this showing, a plaintiff must first "identify the challenged employment practice or policy, and pinpoint the defendant's use of it." E.E.O.C. v. Steamship Clerks Union Local 1066, 48 F.3d 594, 601 & n.6 (1st Cir. 1995) (noting that the 1991 amendments did not affect the elements of the prima facie case). "Second, the plaintiff must demonstrate a disparate impact" on a group with a protected characteristic. Id. "Third, the plaintiff must demonstrate a causal relationship between the identified practice and the disparate impact." Id. A plaintiff must typically "demonstrate that each particular challenged employment practice causes a disparate impact." 42 U.S.C. § 2000e-2(k)(1)(B)(i). However, "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." Id.

Once the plaintiff meets her burden, the employer must "demonstrate that the challenged practice is job related for the

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[3] Kilcoyne has not proposed any "alternative employment practice" to meet her burden under the theory codified at § 2000e-2(k)(1)(A)(ii)&(C).

position in question and consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i). On the other hand, if the employer defeats the prima facie case by "demonstrat[ing] that a specific employment practice does not cause the disparate impact," that employer "shall not be required to demonstrate that such practice is required by business necessity." § 2000e-2(k)(1)(B)(ii).

Kilcoyne's allegation that Bentley has a policy designed to fill "ostensibly tenure track slots with less-qualified female candidates to defeat qualified internal female candidates" does not trigger a disparate impact analysis. This is not an allegation that Bentley unintentionally disfavors women through a facially neutral policy, but rather an allegation of a non-neutral policy specifically designed to discriminate against women. This allegation is thus more properly analyzed as intentional disparate treatment.

Kilcoyne also alleges that Bentley employs a neutral practice of hiring based on subjective criteria heavily influenced by the departmental chairman, as well as a neutral practice of inadequate recordkeeping. However, the only evidence she provides to show that these policies had a discriminatory impact on women is that Bentley hired Guido instead of Kilcoyne and that Guido had less experience. There is no statistical information in the record that evidences any actual discriminatory impact on women.

C. Remaining claims

Having rejected Kilcoyne's federal claims, I will dismiss the pendent state claims without prejudice. 28 U.S.C. § 1367(c)(2). I note, however, that under well-established Massachusetts law, Chapter 151B provides the exclusive remedy for the allegations of gender discrimination that Kilcoyne

has pled as "wrongful termination." See Melley v. Gillette Corp., 19 Mass. App. Ct. 511, 513, 475 N.E.2d 1227, 1228 (1985), aff'd, 397 Mass. 1004, 491 N.E.2d 252 (1986).

ORDER

For the foregoing reasons, defendants' renewed motion for summary judgment (Docket No. 54) is **ALLOWED** as to Counts I, II, and III. Counts IV and V shall be dismissed without prejudice.

PATTI B. SARIS
United States District Judge

APPENDIX D.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.: 93-12183-PBS

PAULA KILCOYNE
Plaintiff

v.

BENTLEY COLLEGE,
EARL L. AVERY,
PHILIP FRIEDMAN,
H. LEE SCHLORFF, and
STEWART P. SHAPIRO,
Defendants

ORDER OF JUDGMENT AND DISMISSAL

SARIS, D.J.

In accordance with the Court's Memorandum and Order dated August 2, 1996, granting #54, defendants' motion for summary judgment, it is hereby ORDERED:

JUDGMENT for the defendants as to Counts I, II, and III. Counts IV and V are dismissed without prejudice.

By the Court,
Deborah L. Whitney, Clerk
(617) 223-9175

August 2, 1996

Pursuant to Fed.R.Civ.P. 77(d), counsel are advised that this order and/or judgment was entered on the docket on 8-5-96.

Date: August 5, 1996

Catherine M. Gawlik
Deputy Clerk

(2)

Supreme Court, U.S.
FILED
NOV 24 1997
CLERK

No. 97-710

In The

Supreme Court of the United States

October Term, 1997

PAULA KILCOYNE,

Petitioner,

vs.

BENTLEY COLLEGE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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2388

QUESTIONS PRESENTED

1. Whether the First Circuit Court of Appeals ("the First Circuit"), merely by affirming *per curiam* a grant of summary judgment by the District Court, decided an important federal question in a way that conflicts with relevant decisions of this Court.

2. Whether the First Circuit's *per curiam* affirmation of a grant of summary judgment by the District Court conflicts with a decision of the Third Circuit Court of Appeals ("the Third Circuit") on an important matter.

3. Whether this Court's exercise of supervisory power is required merely because the First Circuit ordered double costs charged against petitioner Paula Kilcoyne's counsel because he unreasonably and vexatiously multiplied the proceedings in this case.

PARTIES TO THE PROCEEDING

The petitioner is Paula Kilcoyne ("Kilcoyne").

The respondents are: Bentley College ("Bentley"); Earl L. Avery ("Avery"), Bentley's Assistant for Equal Employment Opportunity; Philip Friedman ("Friedman"), Bentley's Vice President for Academic Affairs and Provost; H. Lee Schlorff ("Schlorff"), Bentley's Dean of Faculty; and Stewart P. Shapiro ("Shapiro"), the late Bentley Professor of Government and Department Chair.[1]

Bentley is a nonprofit organization with no parent companies and no nonwholly owned subsidiaries.

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1. Shapiro died in January 1994, approximately three months after the initiation of this litigation.

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STATEMENT OF THE CASE

A. Introduction

Kilcoyne, *a woman*, bizarrely sued the respondents for *sex* discrimination after Bentley chose *another woman* for a college teaching position.[2] When presented with the respondents' motion for summary judgment, the District Court, using *exactly the prima facie criteria urged upon the District Court by Kilcoyne*, found that Kilcoyne had not established a prima facie claim of sex discrimination and awarded summary judgment, because there was absolutely no evidence that sex played any role whatsoever in any aspect of the selection process. Kilcoyne then appealed the award of summary judgment to the First Circuit on the increasingly bizarre theory that the District Court somehow had erred by adopting exactly the prima facie criteria that Kilcoyne had advocated. Further, Kilcoyne also invoked on appeal an utterly baseless theory about which she had never before even hinted — *i.e.*, that *sex* discrimination somehow had been proven because of evidence that the college selection committee believed that the *other woman's* Hispanic *ethnicity* would "complement" the college student body. In response, the First Circuit not only affirmed the District Court award but also imposed sanctions on Kilcoyne's counsel for unreasonably and vexatiously multiplying the proceedings. Now, completely undeterred by these sanctions, Kilcoyne brings her frivolity to this Court and petitions for Certiorari on the meritless notions that: (1) this Court's precedents actually required the District Court to award summary judgment to her on sex discrimination

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2. Six women and 38 men applied for the position. The selection committee, which consisted of two men and one woman, dismissed from further consideration all 38 male candidates and four of the six female candidates. Two women, Kilcoyne and Maria de los Angeles Guido ("Guido"), were the only finalists. Ultimately, Bentley hired Guido, not Kilcoyne.

claims notwithstanding the absence of any evidence whatsoever that sex was a factor in the hiring decision; (2) the District Court's application of the Kilcoyne-advocated prima facie criteria for sex discrimination claims somehow conflicts with unrelated decisions in the Third Circuit; and (3) the sanctions imposed by the First Circuit because of unreasonable and vexatious multiplication of proceedings were improper.[3] The Petition necessarily should be denied. Entirely absent is any justification for an exercise of this Court's discretionary jurisdiction.

B. Statement of Facts

Bentley employed Kilcoyne first as a part-time instructor in the Government Department from 1986-1989, and then in a non-tenure track position as an Assistant Professor in the Government Department for the spring semester of 1989. *See* Kilcoyne's Appendix to the Appellate Brief she submitted to the First Circuit ("First Circuit App.") at 82. Bentley thereafter renewed Kilcoyne's appointment in this latter, non-tenure track position for successive one-year terms, ending with the 1991-1992 term. First Circuit App. at 82. Kilcoyne's final period of employment with Bentley expired by its own contractual terms on June 30, 1992; she had no right to continue employment at Bentley beyond that date. First Circuit App. at 83, 87-88.[4]

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3. As is discussed below, at issue are sanctions of a truly *de minimis* amount — a grand total of $76.50.

4. The contract Kilcoyne signed on May 15, 1991, stated as follows:

> This is a non-tenure track appointment signifying that the recipient thereof cannot expect automatic renewal of the full-time contract and accepts this fact as a precondition of employment. This temporary employment will expire on 6/30/92 unless renewed at the discretion of [Bentley] and no further notice of termination will be given.

First Circuit App. at 88.

In the Fall of 1991, because of the announced retirement of a tenured Government Department member, Bentley decided to attempt to fill a potential tenure track position in that Department. First Circuit App. at 82, 92. Shapiro, the Chair of the Government Department, commenced the search by publishing a job announcement that stated that Bentley was seeking applicants with an expertise in Comparative International Politics, and preferably a "Concentration in Latin America." First Circuit App. at 92, 96. Many candidates applied for the position, including Kilcoyne. First Circuit App. at 92.[5] The three senior members of the Government Department, one of whom is a woman,[6] selected *two women*, Kilcoyne and Guido, as the only finalists. First Circuit App. at 92. *None of the male candidates were selected as finalists*. First Circuit App. at 92.[7]

During the selection process, Schlorff, the Dean of Faculty, met privately with Kilcoyne for approximately forty-five

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5. Kilcoyne's purported "expert," David A. Burn ("Burn"), reported that he reviewed the files of 44 applicants for the position. First Circuit App. at 398. Six of the 44 applicants were women; 38 were men. First Circuit App. at 400, 405.

6. The female member of the selection committee was Professor Christine Williams ("Williams"), whose affidavit is at First Circuit App. at 91-96. Williams subsequently became Chair of the Government Department, thus further undercutting Kilcoyne's theory that the Department discriminates against women. First Circuit App. at 91.

7. The irony of Kilcoyne's *sex* discrimination claim is even further magnified by the report of her "expert," who opined that, although "Paula Kilcoyne and Maria Guido were the most qualified female applicants for the position," "several male applicants were more qualified than either Paula Kilcoyne or Maria Guido in terms of numbers of years with a Ph.D., number of years in teaching, number of publications, and knowledge of Latin America." First Circuit App. at 398. *See also* First Circuit App. at 401.

minutes. First Circuit App. at 83, 101. In his capacity as Dean, Schlorff was already familiar with Kilcoyne's work. First Circuit App. at 83.

Similarly, the senior members of the Government Department were already familiar with Kilcoyne; she had worked as a full-time faculty member of the department since January 1989 and, before that, as a part-time adjunct faculty member since September 1986. First Circuit App. at 92. Guido, on the other hand, travelled from Texas for her interview, and was less familiar with the Government Department, the Bentley campus, and the local community. First Circuit App. at 92. To familiarize Guido with Bentley, the selection committee introduced her to some of Bentley's staff, administrators, and faculty, and met her at her hotel for dinner in accordance with Bentley's customary practice for out-of-town job candidates. First Circuit App. at 92-93.

The selection committee invited both of the two female finalists to give presentations at Bentley in support of their candidacies. Guido's presentation focused on her research in Latin America and international political economy. First Circuit App. at 94. Kilcoyne's presentation involved the psychological background of Presidents, a topic unrelated to the job position. First Circuit App. at 94.

Subsequently, the three senior members of the Government Department *unanimously* found that Guido was a better candidate than Kilcoyne. First Circuit App. at 92-95. They reasoned that Guido's experience was in Latin American Politics and international political economy, that only Guido had experience teaching courses specifically focused in these areas, and that Guido's background and expertise in international political economy would accommodate Bentley's desire to move in an interdisciplinary direction. First Circuit App. at 93. Other

factors were that Guido's scholarly work was in the field of international political economy and Latin American politics, and in her presentation to the Department, Guido discussed her research in these areas. First Circuit App. at 94. In addition, the committee believed that, since Kilcoyne already had been working at Bentley full-time for three years, Kilcoyne would become a tenure candidate at a time when she would be unable to achieve tenure status, because she lacked an existing record of publications. First Circuit App. at 95. Although Guido did not yet have her Ph.D. as of the Spring of 1992, Shapiro checked with Guido's thesis advisor and learned that Guido already had defended her dissertation. First Circuit App. at 94. The selection committee thus understood that Guido's dissertation only needed editorial revisions and binding, and that she then would be awarded her Ph.D. First Circuit App. at 94.[8] Finally, the selection committee believed that, in addition, Guido's Hispanic ethnicity would complement the student body. First Circuit App. at 93.

The three senior Government Department members on the selection committee therefore recommended unanimously that Bentley offer the position to Guido. First Circuit App. at 94. Schlorff, the Dean, with the concurrence of Friedman, the Provost, approved that recommendation. First Circuit App. at 82-83. No one at Bentley ever indicated to Kilcoyne that the reason she did not get the position was because she was a woman. First Circuit App. at 102-103. Schlorff and Friedman are adamant

8. Guido in fact received her Ph.D. in the Fall of 1992, shortly after she began teaching at Bentley. First Circuit App. at 94. It is thus unfair and misleading that the Petition repeatedly refers to Kilcoyne as "*Dr.* Kilcoyne" but diminishes Guido by labeling her only as "*Ms.* Guido". *See generally* Petition (emphasis added). Also notable in this purported *sex* discrimination case, in which Bentley unanimously selected a woman *about* to receive a Ph.D. over a woman who already had a Ph.D., is that even Kilcoyne's "expert" notes that Bentley rejected all 16 male applicants who had Ph.D.'s, along with the 22 male applicants who did not have Ph.D.'s, without even interviewing them. First Circuit App. at 401, 414.

that sex played no role whatsoever in Guido's selection. First Circuit App. at 83, 131.

C. Proceedings Below

On October 6, 1993, Kilcoyne filed her Complaint in the District Court. First Circuit App. at 16. The Complaint sets forth five counts: alleged *sex* discrimination in violation of Title VII (Count I), alleged *sex* discrimination in violation of 42 U.S.C. § 1981 (Count II), alleged *sex* discrimination in violation of the Civil Rights Act of 1991 (Count III), alleged wrongful termination (Count IV), and alleged breach of contract (Count V). First Circuit App. at 22-24. Kilcoyne made no mention in her Complaint of discrimination on the basis of ethnicity or national origin.

On March 22, 1995, the respondents filed Defendants' Motion for Summary Judgment seeking summary judgment on all five counts. First Circuit App. at 8, 49-148. The District Court denied this motion "without prejudice to renewing after the close of discovery." First Circuit App. at 10.

On July 24, 1995, after additional discovery, the respondents filed Defendants' Renewed Motion for Summary Judgment. First Circuit App. at 214-287. On January 25, 1996, the District Court held a hearing on this renewed motion. First Circuit App. at 14, 525-544. On August 2, 1996, the District Court issued its Memorandum and Order on Defendants' Motion for Summary Judgment, allowed the motion with regard to Counts I-III, and dismissed without prejudice the state law claims in Courts IV and V. Petition, Appendix C. The District Court issued its corresponding Order of Judgment and Dismissal on August 5, 1996. Petition, Appendix D.

Kilcoyne filed a notice of appeal with the First Circuit on

September 4, 1996. First Circuit App. at 15. In her appellate brief, Kilcoyne argued *for the very first time* her theory that "[b]y providing direct evidence that the defendants placed substantial reliance on a factor, *national origin*, whose consideration is forbidden by Title VII, Dr. Kilcoyne eliminated the necessity for the Court to apply the prima facie case" to her claim of *sex* discrimination. *See* Appellate Brief submitted by Kilcoyne to the First Circuit at 18 (emphasis added). In response, the First Circuit, in a May 22, 1997, *per curiam* opinion, affirmed the District Court's award of summary judgment to the respondents and ordered double costs assessed against Kilcoyne's counsel for unreasonably and vexatiously multiplying the proceedings. Petition, Appendix B.[9] Further, on July 24, 1997, the First Circuit denied Kilcoyne's petition for rehearing. Petition, Appendix A.

Kilcoyne filed her Petition for a Writ of Certiorari on October 22, 1997. The Petition was placed on this Court's docket on October 24, 1997.

D. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.2, the respondents bring to the Court's attention the following misstatements of fact and law in the Petition.

The Petition falsely states that "[i]n November 1991, the Government Department published advertisements seeking applicants *for the job Dr. Kilcoyne held*, but as a potential tenure-track position." Petition at 4 (emphasis added). As is explained above, Kilcoyne *never* held the position that Bentley advertised. Instead, two separate jobs were involved. Kilcoyne's job, a non-

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9. Undeterred, the same counsel represents Kilcoyne in conjunction with the instant Petition.

tenure track position as an Assistant Professor in the Government Department, expired by its own contractual terms on June 30, 1992, as is stated in the Complaint, ¶ 57. First Circuit App. at 22, 83, 87-88. The other position, the one for which Kilcoyne and Guido competed, was a potential tenure track position that Bentley College advertised in the Fall of 1991 because of the announced retirement of a tenured Government Department member. First Circuit App. at 82, 92.

The Petition falsely states that "[a]t the time of the hiring decision, Dr. Kilcoyne possessed the advertised requirements for the position while Ms. Guido did not." Petition at 5. Notwithstanding Kilcoyne's assertion, Guido satisfied Bentley's job criteria. Indeed, Kilcoyne's "expert" opined that "Paula Kilcoyne and Maria Guido were the most qualified female applicants for the position." First Circuit App. at 398, 401. Thus, as the District Court concluded, "Kilcoyne . . . failed to provide any admissible evidence that Guido was unqualified for the position. . . ." *See* Petition, Appendix C at 5a.

The Petition falsely states that "Dr. Kilcoyne had an earned doctoral degree, an advertised absolute requirement for the position, while Ms. Guido did not." Petition at 5. This is another gratuitous attempt by Kilcoyne to smear Guido with the label of "unqualified," a label that the District Court explicitly rejected. As is noted above, Bentley determined in advance that the award of Guido's Ph.D was imminent, and Guido, in fact, received the Ph.D. in the fall of 1992, shortly after Bentley hired her. First Circuit App. at 94.

The Petition falsely states that "Ms. Guido's record was objectively inferior to that of Dr. Kilcoyne in the areas of teaching and research," and that Guido "had no record of scholarly activity at the time of the hiring decision." Petition at 5, 18. Kilcoyne adduced no evidence to support such malign

contentions. As the District Court found, Guido had 2 1/2 years teaching experience, including experience teaching American National Government, had expertise in Latin American politics and international political economy, and had presented conference papers. Petition, Appendix C at 7a. Further, Kilcoyne's own "expert" credited Guido with publishing three journal articles and eight book reviews. First Circuit App. at 272, 274.

The Petition makes a misstatement through omission of pertinent facts when it asserts that "Bentley College employed different processes to evaluate Dr. Kilcoyne and Ms. Guido." Petition at 5. The only differences in treatment related to Guido having been an out-of-town job candidate. First Circuit App. at 92-93. As is discussed above, Guido traveled from Texas for her interview, and was less familiar with the Government Department, the Bentley campus, and the local community. First Circuit App. at 90-93. Kilcoyne, by contrast, had been a full-time faculty member at Bentley College since January 1989. First Circuit App. at 92. Notably, Kilcoyne never alleged that she did not know well all three members of the Bentley selection committee and others holding positions in campus administration. It is thus patently absurd, perhaps even deceitful, for Kilcoyne now to complain that "[she] was not introduced to these people." *See* Petition at 5.

The Petition falsely states that "[t]he mendacity of Chairman Shapiro influenced some members of the Department to favor Ms. Guido." Petition at 5. There is no evidence whatsoever that Shapiro was "mendacious" in anything that he did.

The Petition falsely states that "[a]fter litigation commenced, the defendants cited Maria Guido's Costa Rican ethnic origin as a factor which substantially influenced their decision to hire her and to reject Dr. Kilcoyne." Petition at 6.

Instead, the three senior members of the Government Department unanimously found that Guido was a better candidate than Kilcoyne for the *multitude* of reasons set forth above. The *only* thought of any type given to Guido's Hispanic ethnicity was that it would "complement" the student body. Notably, there is no evidence in this case about Kilcoyne's ethnicity, no evidence about the ethnic composition of the student body, and no evidence about how Kilcoyne's ethnicity might also "complement" the student body — after all, Kilcoyne based her discrimination claims solely on sex, and the parties therefore never litigated such issues of ethnicity in the District Court.

The Petition falsely states that the District Court "found" that "Guido's Hispanic ethnicity appeared to play a significant role in the hiring decision." Petition at 8. It is beyond question that the District Court never made any such finding of fact. Instead, the District Court, bending over backward to interpret the evidence in the light most favorable to a plaintiff facing an adverse summary judgment motion, merely used a comment about the *un*claimed and *un*litigated issue of ethnicity to illustrate the complete absence of any evidence related to the *sex* discrimination claim that Kilcoyne was trying (without any evidence) to prosecute. There was thus no basis for a "finding" regarding ethnicity, much less any actual "finding."

REASONS FOR DENYING THE WRIT

The Supreme Court should decline Certiorari in this case because the First Circuit did *not* decide an important federal question in a way that conflicts with a decision of this Court or of the Third Circuit, and this Court's exercise of supervisory power otherwise is not required.

I.

THERE IS NO FIRST CIRCUIT CONFLICT WITH THIS COURT.

Kilcoyne argues that the First Circuit's *per curiam* affirmation of the award of summary judgment to the respondents conflicts with decisions of this Court because "findings [by the District Court related to *ethnicity*] eliminated the necessity for any court to apply the prima facie case" in her *sex* discrimination case. Petition at 8. Her contention is without merit. First, as is emphasized above, there was no such "finding." The District Court merely commented on ethnicity to illustrate the utter absence of evidence relating to Kilcoyne's sex discrimination claims, not to make a separate "finding."

Second, even more inane is Kilcoyne's implicit assertion that a claim for *sex* discrimination somehow is proven when her counsel, for the very first time on appeal, argues that an award of summary judgment to the respondents should be overturned because the respondents actually discriminated against her on the basis of *ethnicity*. Kilcoyne does not and cannot contend that she ever argued this theory of her case at any time prior to her appeal of the District Court's ruling. Nor can she cite valid case law from this or any other court to support an argument so bizarre and untimely.

Kilcoyne thus displays sheer desperation when she asserts disingenuously that "Respondents did not argue the existence of a bona fide program of affirmative action nor that they had validated some relationship between Hispanic ethnicity and the ability to teach subjects with Latin American content." Petition at 11. Because Bentley and the other respondents *never had any need to make such arguments*, they of course did not. After all, Kilcoyne proceeded in the District Court *only* on the basis

of alleged *sex* discrimination, and it was only on her appeal to the First Circuit Court of Appeals that she first invoked ethnicity and national origin in any context. The pertinent First Circuit case law on this point is supremely unexceptional: "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 22-23 (1st Cir. 1991), *cert. denied*, 504 U.S. 910 (1992).

Further, Kilcoyne, quite obviously, has no absolute insight into, and can only speculate about, the multitude of reasons on which the First Circuit relied when it issued its *per curiam* opinion affirming the District Court's award of summary judgment to the respondents.[10] Mere speculation about the First Circuit's motivation cannot possibly provide an adequate basis for an exercise of this Court's discretionary jurisdiction. Nor is there precedent in this Court or anywhere else holding that an award of summary judgment to defendants on claims of sex discrimination should be overturned when a plaintiff, for the very first time on appeal, raises issues relating to ethnicity. That Kilcoyne once again asserts such baseless arguments so vehemently in her Petition to this Court illustrates exactly the frivolity for which the First Circuit already imposed sanctions.

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10. There is no question that the First Circuit had a multitude of possible reasons. As the respondents then argued, Kilcoyne's appellate brief was lacking in compliance with Fed. R. App. P. 28(a)(4) in that the brief's purported "statement of facts" was not based on, and did not have appropriate references to, the record; Kilcoyne could not show the existence of any genuine dispute of material fact; Kilcoyne attempted to argue on appeal issues never presented to the District Court; and Kilcoyne misstated to the First Circuit the evidence in the record and the applicable law. *See generally* First Circuit Brief for Defendants-Appellees.

II.

THERE IS NO FIRST CIRCUIT CONFLICT WITH THE THIRD CIRCUIT.

Kilcoyne's arguments relating to an alleged conflict between the circuits are even more tortured. Her Petition asserts that "the First Circuit . . . erred in requiring evidence at the prima facie stage that sex was not treated neutrally in the hiring decision, a requirement which is in direct conflict with decisions of the Third Circuit." Petition at 13. Worth noting at the outset is that the First Circuit stated *absolutely nothing* about the prima face case in its *per curiam* decision, much less anything in conflict with the decision of another court, because it necessarily determined that it did not *need* to delve into detailed written analysis in order to reject Kilcoyne's frivolous appeal. *See* Petition, Appendix B. Even more salient, however, is the inconsistency that Kilcoyne displayed at the First Circuit and continues to display now — after all, in Plaintiff's Opposition to Defendant's Motion For Summary Judgment, *Kilcoyne explicitly argued to the District Court exactly the prima facie criteria that she argued against on appeal.* Kilcoyne argued to the District Court as follows:

> The United States Supreme Court has set forth a three-step, process to prove intentional discrimination when direct evidence is not available. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). First, the plaintiff establishes a prima facie case by proving that she is female, she applied for and was qualified for the position for which the employer was seeking applicants, that despite her qualifications she was rejected, and *the employer did not treat sex neutrally in subsequently filling the position.* [Other citations omitted.]

First Circuit App. at 303 (emphasis added). *See also* First Circuit App. at 300, where Kilcoyne, in the very same brief to the District Court, argued that "Dr. Kilcoyne has a clearly established prima facie case in that . . . (4) *sex was not treated neutrally* . . . ." Similarly, in oral argument to the District Court, Kilcoyne's counsel argued *not* that a prima facie case is irrelevant but *instead* that Kilcoyne met her prima facie burden because "in this case *sex was not treated neutrally*. . . ." First Circuit App. at 541 (emphasis added). Thus, Kilcoyne's sudden change of heart concerning the elements of a prima facie case of sex discrimination was enough in itself to underscore the frivolousness of her appeal. "It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal." *McCoy*, 950 F.2d at 22-23.

Moreover, the truly exacerbating aspect of Kilcoyne's frivolity is that, despite sanctions below, Kilcoyne now seeks to mislead this Court in exactly the same way — she argues yet again that "[t]he district [court] states the fourth element [of the prima facie case] incorrectly" (*see* Petition at 14) even though at issue is exactly the prima facie case that *she* advocated to the District Court. A reasonable conclusion is that it was exactly this type of disingenuity on the part of Kilcoyne that influenced the First Circuit's *per curiam* affirmation of the District Court's order and its *imposition of double costs* on Kilcoyne's counsel.

Particularly outrageous is Kilcoyne's present argument that the opinion of the Third Circuit in *Marzano v. Computer Science Corp., Inc.*, 91 F.3d 497 (3rd Cir. 1996) establishes a rule contrary to the decision of the First Circuit. *See* Petition at 15-18. There is *nothing* in *Marzano* even remotely on point. There, the defendants terminated plaintiff's employment, allegedly as a result of a reduction in force. 91 F.3d at 499. When the district court analyzed Marzano's pregnancy discrimination claim as having occurred in a force reduction setting and awarded

summary judgment to the defendant employers, the Third Circuit held that "the issue of . . . whether a reduction in force did occur was a question of fact that should have been presented to the jury and which, on summary judgment, should be resolved in favor of the non-moving party, i.e., Ms. Marzano." 91 F.3d at 506. It thus overturned the award of summary judgment for the following reason:

> Because the district court could not conclude as a matter of law that a reduction in force (RIF) did occur, the court could only grant summary judgment for the defendants if it found that Ms. Marzano could not make a prima facie case of discrimination under either applicable legal setting — i.e., reduction in force or no reduction in force.

91 F.3d at 506.

The Third Circuit then stated as follows:

> In the context of a reduction in force, we have held that to demonstrate a prima facie case, "the plaintiff must show he was in the protected class, he was qualified, he was laid off and other unprotected workers were retained."

91 F.3d at 508.

The holding by the Third Circuit in *Marzano* is thus too far afield to conflict with the case at hand. Indeed, it is inapposite. Kilcoyne does not and cannot contend that she lost her job through a reduction in force. Rather, her Petition expressly admits that Kilcoyne left Bentley "[w]hen her contract expired on June 30, 1992." *See* Petition at 6. Thus, Kilcoyne's is not even a termination case. The District Court's award of summary

judgment to the respondents instead involves Kilcoyne's claim of sex discrimination relating to a *new* job for which Bentley chose someone else, notably *another woman*. There is thus no possible conflict with *Marzano*.

Equally absurd is Kilcoyne's comparison of her litigation to *Taxman v. Board of Education of Township of Piscataway*, 91 F.3d 1547 (3rd Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997). *See* Petition at 18. At issue in *Taxman* was whether the employer unlawfully discriminated because of race "when it made race a factor in selecting which of two equally qualified employees to lay off." 91 F.3d at 1549. Notably, the parties in *Taxman* "[did] not dispute that [the plaintiff had] established a prima facie case of [race] discrimination or that the Board's decision to terminate her was based on its affirmative action policy." 91 F.3d at 1556. The legal question in *Taxman* was thus "whether Title VII permits an employer with a racially balanced work force to grant a non-remedial racial preference to promote 'racial diversity'." 91 F.3d 1547.

The instant case, by contrast, is radically different. Not only, as is discussed above, is the instant case *not* about a termination; in addition, as the District Court found, no prima facie case was established. Further, there was no evidence about, or litigation concerning, Bentley's affirmative action policy. Nor was there evidence or litigation about whether Bentley has a racially or ethnically balanced work force. Nor was there evidence or litigation about whether Bentley was trying to grant a non-remedial preference of some sort. After all, Kilcoyne sued only on the basis of sex discrimination, did not sue on the basis of ethnicity or national origin, did not challenge any aspect of Bentley's affirmative action policy concerning ethnicity or national origin except by implication *after* she had lost a summary judgment motion in the District Court relating to *sex* discrimination, and did not satisfy the prima facie case for sex

discrimination that she herself advocated to the District Court. *Taxman* thus has no rational relationship to the instant case, and it most certainly is not in conflict.[11] Rather, in the instant case, the District Court's Memorandum and Order are well-reasoned and supported by law, there was no basis for overturning that Order on appeal, and there is even less justification now for an exercise of this Court's discretionary jurisdiction. *See* Petition, Appendix C. In particular, Kilcoyne cannot be allowed to invoke Certiorari over the District Court's application of *exactly* the prima facie criteria that she herself advocated prior to the District Court's ruling. *See* Petition at 19 and Appendix C at 11a; First Circuit App. at 300, 303, 541.

III.

THIS COURT'S EXERCISE OF SUPERVISORY POWER OTHERWISE IS NOT REQUIRED.

The Petition also argues without merit that the First Circuit's "[a]ssessment of [double costs] against counsel for Dr. Kilcoyne under either Rule 38 or Rule 39 is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision." Petition at 22. Notably, "costs" in this case are only $76.50. *See* Appellees' Itemized and Verified Bill of Costs. "Double costs" are thus only $153.00. *Id.* Surely an amount so small does not warrant an exercise of this Court's discretionary jurisdiction.

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11. *Taxman* provides no basis for Kilcoyne's contention that "Dr. Kilcoyne met the modest burden of the prima facie case." *See* Petition at 19. Kilcoyne never showed in any way that Bentley failed to treat sex neutrally. As the District Court concluded, "Kilcoyne has failed to produce any admissible evidence that gender played any role at all in Bentley's hiring decision." Petition, Appendix C at 12a.

Indeed, the Rule is clear that, whenever a judgment is affirmed on appeal, "costs shall be taxed against the appellant unless otherwise ordered." *See* Fed. R. App. P. 39(a). Accordingly, *half* of the "double costs" now at issue would have been awarded to the respondents as a matter of course, even if the First Circuit had not become so aggravated by Kilcoyne's frivolous and vexatious appeal that it imposed sanctions. The "sanctions" portion of the "double costs" is thus a mere $76.50.

Further, to the extent that Kilcoyne possibly can argue that an exercise of this Court's supervisory powers somehow is required because of the First Circuit's well-deserved award of "double costs" against her counsel, *the respondents hereby waive any such claim for "double costs."* Having already paid heavily in this unduly protracted litigation for the sanctionable misconduct of Kilcoyne's counsel, the respondents submit this waiver simply to facilitate further the well-deserved and long-overdue conclusion to the utterly frivolous, vexatious, and expensive claims unreasonably inflicted on them.

CONCLUSION

For all of the above reasons, this Court should deny the Petition and decline to issue a Writ of Certiorari.

Respectfully submitted,

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